Supreme Court, U.S.
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No. 89-508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES CAN COMPANY,
a Georgia Corporation, CONTINENTAL
BEVERAGE PACKAGING, INC.,
a Delaware Corporation,

Petitioners,

v.

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS, *et al.*,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

By alternately misapplying and ignoring this Court's decisions under 28 U.S.C. § 1257, respondents seek to avoid review of the Wisconsin Supreme Court's decision on the "far reaching" and "significant" issue (see IAM Br. to Wis. Ct. App. at 2; Cert. App. 39A) of whether state courts are empowered to apply state-law remedies to *enforce* collective bargaining agreements.[1] The principal basis for this approach (Opp. 7 & n. 3, 8-11) is respondents' surprising claim that a reversal in this Court would merely send the case back to the Wisconsin courts for development of a factual record as to the validity of the IAM's claims under Section 301 because these issues "have not yet been litigated." *Id.* This prediction seriously misstates the posture of this case. Respondents have already litigated and lost their Section 301 claims on

[1]Petitioners' Statement required by Rule 28.1 appears at p. ii of the Petition for a Writ of Certiorari.

the merits. In *International Ass'n of Machinists* v. *United States Can Co.*, No. 87-C-1221 (E.D. Wis. Apr. 12, 1989) (Rep. App. 1A to 19A), respondents challenged the identical conduct challenged in this lawsuit, but on the ground, among others, that petitioners had violated Section 301. The federal court dismissed respondents' Section 301 claims precisely because respondents had failed to exhaust available grievance procedures and otherwise had failed to state a claim. Accord *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 220-21 (1985). Therefore, in view of the federal court's final and binding, unappealed judgment, the Wisconsin courts are foreclosed from considering respondents' compliance with Section 301's prerequisites. In all events, the Section 301 pre-emption issue is clearly and appropriately presented in its current posture.

Also, respondents conspicuously fail to argue, much less demonstrate, how the "new rule of law" they sought and obtained in the Wisconsin courts (see IAM Br. to Wis. Ct. App. at 2) is defensible under this Court's precedents or why it should not be summarily vacated. At the same time, respondents do not retreat from their previously stated view that the rule has "nationwide impact" and "far-reaching significance in the fields of labor law and fraudulent conveyance law." *Id.*; accord Cert. App. 39A. On this point, petitioners and respondents agree. Based on its erroneous conception of this Court's precedents, the Wisconsin Court unambiguously held that a party seeking to enforce a collective bargaining agreement may resort to state law—here a fraudulent conveyance statute—that is "not intended" to provide "substantive" rights but is simply a remedy to *enforce* private obligations, whenever a state considers such "remedial" rights to be "non-negotiable" or otherwise "significant." Cert. App. 14A-16A, 19A. This is so despite the fact that the Wisconsin Court and *all* parties to this litigation further agree that whatever obligations petitioners owe derive entirely from the labor contract—and nowhere else. See Cert. App. 4A, 19A, 21A; Pet. 10-11; Opp. 2.

Wisconsin's "new rule of law" flies in the teeth of this Court's pre-emption precedents (Pet. 8-11) and, if allowed to stand, would eviscerate the most fundamental purposes and policies of Section 301 by opening a whole range of state remedies for breach of such agreements.

I. The Decision Of The Wisconsin Supreme Court Is Final For Purposes Of Section 1257

Respondents' claim that this Court does not have statutory jurisdiction alternately misapplies and ignores this Court's precedents. Respondents acknowledge (Opp. 4) that under *Belknap Inc.* v. *Hale*, 463 U.S. 491, 497-98 n. 5 (1983), and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-85 (1975), a judgment is deemed final under 28 U.S.C. § 1257 whenever (1) the federal issue decided by the state court has been finally resolved; (2) reversal of the state court on the federal issue would dispose of the entire litigation; and (3) failure to review the state court's decision immediately "might seriously erode federal policy" as expressed in the federal constitution or statutes. See, e.g., *Cox*, 420 U.S. at 482-83; *Belknap*, 463 at 497-98 n. 5; *Construction Laborers* v. *Curry*, 371 U.S. 542, 549-50 (1963). This case easily satisfies each of these requirements and respondents stretch to suggest otherwise. Respondents also ignore *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-8 (1984), where this Court recognized that the only practical time for this Court to take jurisdiction of a state court's refusal to enforce a federal policy mandating arbitration was at the outset of the litigation, not after the party demanding arbitration had already been subjected to a full trial on the merits.

1. Because there is no other appeal from the decision of the Wisconsin Supreme Court on the Section 301 pre-emption question, the federal issue has now been finally resolved. Even putting aside the fact that respondents' Section 301 claims have already been decided against them on the merits in federal court (see *supra* pp. 1-2), jurisdiction under Section 1257 cannot be defeated by purely hypothetical or imagined future developments any

more in this case than in *Southland Corp.*, where the Court accepted review of a strikingly similar pre-emption question under the Federal Arbitration Act, 9 U.S.C. § 2. If that were true, this Court would *never* accept jurisdiction over refusals to apply federal law. In *Southland Corp.*, the California Supreme Court had held that claims under the California Franchise Investment Law were not pre-empted and had to be determined in the California courts rather than through an agreement to arbitrate pursuant to the Federal Arbitration Act. Before reversing on the ground that federal law pre-empted the respondent's state-law claims, this Court soundly rejected the argument that the California decision was not a "final judgment or decree" for purposes of 28 U.S.C. § 1257. 465 U.S. at 6-8. Cf. *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985).[2]

2. Respondents' principal contention (Opp. 7 & n. 3, 8-11), that, following reversal, the trial court would still have to address their claims under Section 301 principles, is also meritless. If this

[2]*Allis-Chalmers* further undercuts respondents' argument that this case does not present a final, reviewable order within the *Belknap* rule. First, as respondents note, *Allis-Chalmers* also came before this Court in an "interlocutory" posture. Despite this fact, however, both the AFL-CIO as *amicus curiae* and the employer argued that the case presented a "final judgment within the meaning of *Cox* and 28 U.S.C. § 1257(2)," and that the federal policy favoring arbitration of labor disputes would require dismissal of Lueck's state-law action if the Wisconsin Supreme Court were reversed on the Section 301 pre-emption claim. See AFL-CIO Br. at 21, n. 11; Pet. at 6.

The fact that petitioners have raised additional federal defenses in the lower courts in this case (Opp. 6) also changes nothing. The *Allis-Chalmers* Court expressly noted that a second federal pre-emption question could be presented by that case under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, even if Section 301 were to have been found reconcilable with Lueck's claims. Yet, despite the Court's express recognition of this second federal question which had not yet been litigated, the Court did not question its jurisdiction. Respondents' attempt to read into the *Belknap* rule a further requirement that *no* federal issues remain in the case is therefore directly at odds with *Allis-Chalmers*.

Court were to accept review and reverse the Wisconsin Supreme Court, the case would be resolved. That a different complaint or lawsuit properly pleading Section 301 claims might be brought later is simply irrelevant. "[R]eversal of a state-court judgment in this setting will terminate litigation of the merits of *this* dispute." *Southland Corp.*, 465 U.S. at 6-7 (emphasis supplied).

Moreover, in this case, unlike *Southland Corp.*, no new lawsuit properly raising federal claims is possible because respondents have already litigated under Section 301 and lost. See *supra* pp. 1-2.

3. This case easily satisfies the third condition that the failure to review the federal issue immediately "might seriously erode" an important federal policy. *Cox*, 420 U.S. at 482-83. The plain upshot of the Wisconsin Supreme Court's decision is that a Wisconsin *trial court* will now be called upon to enforce respondents' claims, as set forth in their complaint, for wages, benefits and "claims asserted in various grievance and arbitration proceedings, all owed to the employees pursuant to the collective bargaining agreement." See R. 2, ¶ 3; Cert. App. 4A, 22A-28A & n.1. As the dissent recognized (Cert. App. 22A, 27A), this holding does violence to Congress' carefully crafted federal labor policy, which establishes an absolute preference for the resolution through contractual grievance and arbitration procedures of claims to enforce collective bargaining agreements. *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649-50 (1986). This Court has made it quite clear that "[t]he parties [do] not bargain for facts to be found by a court, but by an arbitrator . . . [and] '*[t]his is especially true when it comes to formulating remedies.*' " *United Paperworkers Int'l Union* v. *Misco*, 484 U.S. 29, 41, 45 (1987) (quoting *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)) (emphasis in original). As the Court held in *Southland Corp.*, "to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate." 465 U.S. at 7-8.

Section 301's protection of grievance and arbitration procedures is no less entitled to enforcement than was the policy in *Belknap* of deferring other types of labor-related disputes to resolution by the National Labor Relations Board. Thus, although this Court has never engrafted onto Section 1257 a requirement that the federal issue must go to the validity of the state court's jurisdiction (Opp. 9), the Section 301 policy is the full equivalent of the jurisdictional issues resolved in *Belknap*, *Southland*, and *Allis-Chalmers* because, as a practical matter, enforcement of this policy determines the forum.[3] Accordingly, allowing the action to proceed through the Wisconsin state courts at this point would present precisely the sort of forum conflict that respondents concede was sufficient to justify granting certiorari in *Belknap* and *Curry*.

Respondents also suggest that this action cannot be reviewed at this time because the case is before the Court on a less than fully developed record. Opp. 10. This argument is nonsense. Examination of respondents' complaint alone requires application of Section 301 pre-emption. That complaint sets forth their attempt to use a state fraudulent conveyance act to enforce contractual rights arising under their collective bargaining agreement. A state court claim "founded directly on rights created by collective bargaining agreements" is preempted by Section 301. *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 394 (1987).[4]

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[3]This policy deliberately ousts both state and federal courts of primary jurisdiction to resolve arbitrable disputes—especially where, as here, no state "substantive" right or duty is at issue. Compare Cert. App. 16A with *Lingle* v. *Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877, 1883 (1988).

[4]In effect, respondents' position, if sustained, would confine the presentation of all pre-emption claims to post-trial motions, and strike a body-blow to the principle of judicial economy.

II. The Wisconsin Supreme Court's Decision Conflicts With The Decisions Of This Court And Other Lower Courts On An Issue Of Paramount National Importance

Respondents conspicuously fail to argue that the Wisconsin Supreme Court's decision is consistent with this Court's decisions and petitioners submit that such a task would be impossible. See Pet. 8-11. Respondents do argue, however, that there is no conflict in the lower courts, a view that is demonstrably incorrect. *Deford* v. *Soo Line R.R. Co.*, 867 F.2d 1080 (8th Cir.), *cert. denied*, 109 S. Ct. 3265 (1989), is only the most obvious example of this conflict. Notwithstanding the varying facts under which the cases arose, the unmistakable principle that emerges from *Deford* and the other federal court decisions cited in the petition is that nonsubstantive, state-law theories may not be invoked to enforce the terms of collective bargaining agreements (Pet. 11-13 & nn. 6, 7).

Because the Wisconsin Supreme Court's "new rule of law"—and the holdings of at least two additional courts[5]—cannot be reconciled with these cases, the need for this Court's guidance is particularly acute. And, as the petition made plain, even though the Wisconsin Court's error is *not* confined to cases involving leveraged buyouts, respondents wrongly suggest that there is "*only one other case*," *Deford*, raising such a challenge to a leveraged buyout. Opp. 13 (emphasis in original); compare Pet. nn. 4, 6 & 7.[6]

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[5]See *Railway Labor Executives Ass'n* v. *Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936 (3d Cir. 1988); *International Ass'n of Machinists* v. *Allegis Corp.*, 545 N.Y.S.2d 638 (N.Y.S. Ct. 1989).

[6]Both the petition and opposition agree that the *Deford* holding conflicts with the Third Circuit's leveraged buyout decision in *Railway Labor Executives Ass'n* v. *Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936 (3d Cir. 1988). See Pet. 11 n. 6, Opp. 12 n. 4; see also *Brown* v. *Keystone Consolidated Industries, Inc.*, 680 F. Supp. 1212, 1219 (N.D.

(Footnote continued on following page)

Respondents' further purported distinction of *Deford* on the ground that *Deford* arose under the Railway Labor Act rather than under Section 301 (Opp. 12) is a facile one. Virtually every RLA pre-emption case decided since *Lingle* has, like *Deford*, analyzed both Section 301 and *Lingle* to decide whether claims like those brought by respondents here were pre-empted. 867 F.2d at 1087-88. To be sure, as respondents suggest (Opp. 12), parallels between the NLRA and the RLA should be drawn with care.[7] But like the court in *Deford*, this Court has long read the RLA and Section 301 *in pari materia* in resolving contract enforcement/pre-emption questions. See *Andrews* v. *Louisville & Nashville R.R. Co.*, 406 U.S. 320, 323 (1972) (relying on *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), and *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652 (1965), to hold that "an agreement required under § 204 of the Railway Labor Act [is] 'like the Labor Management Relations Act § 301 contract . . . a federal contract and . . . therefore governed and enforceable by federal law. . .' "); *International Ass'n of Machinists* v. *Central*

(Footnote continued from previous page)
Ill. 1988) (claims for fraudulent conveyance brought by employee "creditors" under a labor contract are "obviously" pre-empted by Section 301).

See also the recently reported decisions in *International Ass'n of Machinists* v. *Allegis Corp.*, 545 N.Y.S.2d 638 (N.Y.S. Ct. 1989) (court relied on *Lingle* and Section 301 to hold that, contrary to *Deford*, RLA did not pre-empt claims under New York fraudulent conveyance statute); *Gendron* v. *Chicago & Northwestern Transp. Co.*, No. 1-88-1630, 1989 Ill. App. LEXIS 1646 (1st Dist. Oct. 30, 1989) (fraudulent conveyance action was pre-empted under RLA because, under *Lingle*, "resolution of [the] State claim depend[s] upon the meaning of a collective bargaining agreement").

[7]Neither *Chicago & N.W. Ry. Co.* v. *United Transportation Union*, 402 U.S. 570, 579 n.11 (1971) nor *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383-88 (1969), cited by respondents, involved enforcement of labor contracts or the pre-emption of related state-law theories of relief; both cases addressed the very different question of strike activity under the RLA and NLRA.

Airlines, Inc., 372 U.S. 682, 691-92 (1963) (citing *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962), for proposition that "enforceability of [labor contracts] cannot be left to the laws of the many states . . . [t]he needs of the subject matter manifestly call for uniformity").[8]

In the courts below, respondents conceded the enormous practical importance of the Wisconsin Supreme Court's "new rule of law." Respondents have never denied, and cannot deny, that Wisconsin's exception for state-law remedies would inevitably swallow up the heretofore sacrosanct principle that, under federal law, labor agreements must be enforced in the first instance through arbitration. As such, Wisconsin's rule is repugnant to the most basic purposes of Section 301 and this Court's decisions:

> [R]egardless of the rubric under which state law is invoked, § 301 precludes state regulation of the legal consequences to the parties of entering into a collective bargaining agreement. . . . Section 301 leaves no room for the states to apply their own rules of remediation to collective bargaining agreements, which is precisely what Wisconsin has attempted to do here.

AFL-CIO *Amicus Curiae* Brief in *Allis-Chalmers Corp.* v. *Lueck*, *supra*, at 3.

Finally, respondents are correct that this Court has recently denied review in a number of Section 301 pre-emption cases. But respondents vastly overgeneralize; none of those cases presented the kind of fundamental federal labor pre-emption issue presented here. See Opp. p. 14 & n.7. This case involves nothing less than resort to state law to *enforce* the terms of a contract that this Court's decisions mandate be enforced only through federal law. The Wisconsin Supreme Court fundamentally misapplied this

[8]All RLA fraudulent conveyance actions brought to date have considered the pre-emption question with respect to the RLA's "minor dispute" procedures. The "minor dispute" procedures find their analog in arbitrable disputes under Section 301 to enforce the labor contract.

Court's precedents, turning back the clock more than 30 years, in holding that suits to enforce labor contracts can be brought through a state-law, *nonsubstantive* "rule of remediation." Compare *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-57 (1957). If the law of Section 301 and collective bargaining agreements—and the settled expectations it has generated—are to be changed so drastically, it is critical for this Court to explain why.

CONCLUSION

For the reasons stated in this reply and in the petition, the Court should grant the petition for certiorari, summarily vacate the Wisconsin Supreme Court's decision, and remand with directions that the complaint be dismissed as pre-empted. Alternatively, the Court should grant the petition and give the case plenary consideration.

Respectfully submitted,

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December 15, 1989

**Counsel of Record*

APPENDIX

United States District Court
EASTERN DISTRICT OF WISCONSIN

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, et al., *Plaintiffs,* *V.* UNITED STATES CAN COMPANY, et al., *Defendants.*	JUDGMENT IN A CIVIL CASE CASE NUMBER: 87-C-1221

Decision by Court. This action came on for consideration before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants Continental Can Company, U.S.A., Inc.; United States Can Company, Inter-American Packaging, Inc., GP Acquisition Company, Inc., CCC Series 200, Inc.; and Security Pacific Business Credit, Inc's [sic] motions to dismiss plaintiffs' claims under the Labor Management Relations Act (29 U.S.C. § 185) and the Wisconsin Uniform Fraudulent Conveyance Act (Wis. Stats. §§ 242.04, 242.05, & 242.07) are hereby granted and this action is dismissed.

IT IS ALSO ORDERED AND ADJUDGED that actual costs, as determined by the clerk of court pursuant to Local Rule 9, will be assessed against plaintiffs.

IT IS FURTHER ORDERED AND ADJUDGED that defendant Continental Can Company, U.S.A., Inc. recover of the plaintiffs $2,200.00 in attorney's fees; defendants United States Can Company, Inter-American Packaging, Inc., GP Acquisition Company, Inc., and CCC Series 200, Inc. recover of the plaintiffs $1,500.00 in attorneys' fees collectively; and defendant Security Pacific Business Credit, Inc. recover of the plaintiffs $750.00 in attorney's fees.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs pay to the clerk of court $500.00 for deposit in the *pro bono* fund of the Eastern District of Wisconsin.

IT IS FURTHER ORDERED AND ADJUDGED that defendants' motions for a protective order are denied as moot.

APPROVED: /s/ J. P. STADTMUELLER

J. P. Stadtmueller
U.S. District Judge

April 12, 1989
Date

SOFRON B. NEDILSKY
Clerk

/s/ VALERIE L. HASS
(By) Deputy Clerk

United States District Court
EASTERN DISTRICT OF WISCONSIN

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ("IAM"); IAM LOCAL 437, IAM LOCAL 710, IAM DISTRICT 10, IAM DISTRICT 172, individually and as authorized representatives of ALL IAM EMPLOYEES OF UNITED STATES CAN COMPANY, CONTINENTAL CAN CO., CCC SERIES 200, INC., INTER-AMERICAN PACKAGING, INC., and GP ACQUISITION CO., INC.,

Plaintiffs

vs.

UNITED STATES CAN COMPANY, a Delaware Corporation, CONTINENTAL CAN COMPANY, U.S.A., INC., a Delaware Corporation, CCC SERIES 200, INC., a Delaware Corporation, INTER-AMERICAN PACKAGING, INC., a Delaware Corporation, GP ACQUISITION COMPANY, INC., a Delaware Corporation, SECURITY PACIFIC BUSINESS CREDIT, INC., a corporation, and JOHN DOE'S 1-100, collectively referring to the BANKS AND OTHER LENDERS PARTICIPATING IN THE FINANCING OF THE ACQUISITION OF THE CONTINENTAL CAN GENERAL PACKAGING SECTOR BY UNITED STATES CAN CO.,

Defendants.

Case No. 87-C-1221

DECISION AND ORDER

Plaintiffs filed this lawsuit to contest the sale of defendant Continental Can's (Continental) general packaging division to United States Can Company (U.S. Can). Other named defendants are corporate affiliates of U.S. Can (affiliates or affiliated defendants), Security Pacific Business Credit, Inc. (Security), and "John Does 1–100, collectively referring to the Banks and Other Lenders Participating in the Financing of the Acquisition of the Continental Can General Packaging Sector By United States Can Co." (lenders, lending defendants).

Previously, plaintiffs (IAM) brought a similar action in the Circuit Court of Racine County, Wisconsin. The only discernible difference in parties is that Security Pacific was identified as "John Doe" in the state suit. Also, counts three, four and five of the complaint in the instant action are evidently identical to counts in the complaint filed in state court, asserting violations of the Wisconsin Uniform Fraudulent Conveyance Act. The additional claims before this court are asserted under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (§ 301).

Judge Simanek of the Racine County Circuit Court found plaintiffs' claims preempted by § 301. According to the materials filed in the present proceeding, that case is now on appeal.

The named defendants have filed motions to dismiss the suit in this court, as well as motions for sanctions pursuant to Fed. R. Civ. P. 11. Defendants Continental and Security each filed a motion for a protective order staying discovery until the court decided the motions to dismiss. Plaintiffs have filed a cross-motion for Rule 11 sanctions. Not all allegations of the complaint apply to each group of defendants. While seeking to avoid redundancy, I will consider the various claims in due course.

Count I

Count 1 of the complaint is brought pursuant to § 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185,

and alleges that the sale of the Continental general packaging division to defendant U.S. Can is a fraudulent transfer resulting in conveyances or obligations that will render the surviving merged entity insolvent or severely and unreasonably undercapitalized. Plaintiffs allege themselves to be creditors of defendant Continental, entitled to protection against the intentional ruination of their employer-debtor. Insofar as the packaging division sale impairs the ability of Continental or the surviving entity to meet its obligations to employees, plaintiffs allege the sale to be a breach of the IAM-Continental collective bargaining agreement.

Continental urges the court to dismiss Count 1 because plaintiffs failed to utilize the grievance procedure set forth in the collective bargaining agreement. Section 301 preempts state law, asserts Continental, and contemplates arbitration rather than court action. Plaintiffs aver their claims do not implicate applying the collective bargaining agreement to resolve disputes over "wages, hours or conditions of employment."

Defendant has the better of this argument. It is well established that § 301 preempts state law. *IBEW, AFL-CIO v. Hechler,* ___ U.S. ___, 107 S.Ct. 2161 (1987). Plaintiffs ground their status as "creditors" on their position as employees. Their underlying concern is their employer's ability to meet employment and wage-related obligations: this dispute falls within the scope of § 301. Plaintiffs' related argument that the collective bargaining agreement's grievance procedure is too narrow to cover the present dispute is incorrect. According to plaintiffs, the agreement distinguishes between the "company" and "management", while this dispute is between the union and company owners. In their most distant relation, however, management represents the company owners. As Continental points out, the terms "company" and "management" appear to be used interchangeably in that portion of the agreement outlining the grievance procedure.

Plaintiffs argue that the grievance procedure set forth in article 13 of the collective bargaining agreement is not the mandatory

or exclusive means of dispute resolution allowed under the terms of that agreement. Unless the parties specifically agree otherwise, however, the grievance procedure outlined in the agreement must be taken as exclusive. *Republic Steel v. Maddox,* 379 U.S. 650, 652-53, 657-58 (1965); *Huffman v. Westinghouse Electric Corp.,* 752 F.2d 1221, 1225 n.4 (7th Cir. 1985). "Apart from matters the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement." *Steelworkers v. Warrior & Gulf Co.,* 363 U.S. 574, 581 (1960).

The exhaustion requirement is also well established. Employees, acting through their union, must pursue grievance remedies through the procedure set forth in the collective bargaining agreement before bringing an action under § 301. *Republic Steel v. Maddox,* 379 U.S. at 652-53; *Vaca v. Sipes,* 386 U.S. 171, 185 (1966); *Huffman v. Westinghouse Electric Corp.,* 752 F.2d at 1223.

Plaintiffs argue that this case falls under a number of exceptions to the exhaustion requirement. One argument is that the union need not exhaust the contractual remedies where the parties have expressly agreed that the collective bargaining agreement is not the exclusive remedy. Plaintiffs do not point to such an express agreement. As indicated above, all disagreements fall within the scope of the grievance provisions unless specifically excluded.

Next, plaintiffs argue that where contractual remedies are unsatisfactory or unworkable by reason of the employer's misconduct, exhaustion of remedies is not required. Plaintiffs' primary justification for applying this exception is that the grievance procedure is not structured to provide remedies for the particular misconduct alleged. But the alleged misconduct does not prevent plaintiffs from invoking the contractual grievance procedure. The

appropriate mechanism for dealing with perceived violations of the collective bargaining agreement is through the agreement's procedure.

The same reasoning dispenses with plaintiffs' contentions that exhaustion is not required because a formal effort to pursue contractual remedies would be futile, and because the remedy sought is unobtainable through the grievance procedure. Both these arguments are also grounded on the inadequacy of the grievance procedure to provide the requested relief. But questions of grievance procedure, including the question of whether this procedure would permit the relief requested, are not for a court to decide. These questions must be left to the arbitrator. *United Electrical Radio and Machine Workers of America v. Honeywell Inc.*, 522 F.2d 1221, 1226 (7th Cir. 1975). "And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." *Republic Steel v. Maddox*, 379 U.S. at 653.

Plaintiffs argue exhaustion is not required because the employer's conduct amounts to a repudiation of the collective bargaining agreement. The acquisition agreement cited by plaintiffs, while raising the possibility that Continental might be unwilling to be bound by the grievance procedure, is far from conclusive. Continental strongly asserts that the collective bargaining agreement remains in effect. There is no indication that defendant has frustrated the grievance process. Applying this exception would itself preclude use of the grievance process, thwarting the § 301 policy of enforcing collective bargaining agreements.

Count II

Count II essentially makes the same § 301 claim as Count I, but against defendant U.S. Can and its affiliates as successors to Continental and purported employers of plaintiffs under the acquisition agreement.

Defendants contend that this count should be dismissed for failure to allege the existence of a collective bargaining agreement between plaintiffs and these defendants. Even if the court might find the collective bargaining agreement remains in effect between these parties, defendants point out, plaintiffs make a claim under the agreement without having exhausted their administrative remedies. Plaintiffs counter this argument by asserting that U.S. Can assumed the economic terms and obligations of the IAM-Continental collective bargaining agreement but renounced all other terms, including the grievance procedure.

Although U.S. Can did accept the economic terms of the collective bargaining agreement, it do [sic] so only in the context of forming a contract with Continental. The assumption of economic terms gives meaning to the contract for Continental's sale of the packaging division to U.S. Can. The ruling in *Baker v. Fleet Maintenance, Inc.*, 409 F.2d 551 (7th Cir. 1969) governs this case. In *Baker,* truck drivers sued their employer and Sears. Sears had hired the drivers for Fleet and promised them various benefits. The drivers' union had signed a collective bargaining agreement with Fleet but not with Sears. The seventh circuit found that Sears could not be made a defendant to the § 301 suit because Sears was not a party to the collective bargaining agreement providing the basis for plaintiffs' claims. *Id.* at 554. *See Loss v. Blankenship,* 673 F.2d 942 (7th Cir. 1982) (reviewing case law); *cf. Pattern Makers Pension Trust Fund v. Badger Pattern Works, Inc.*, 615 F.Supp. 792 (N.D. Ill. 1985) (§ 301 could not be used to enforce a contribution agreement between the fund and the employer because the contract was not between an employer and a labor organization). In the case before this court, U.S. Can is not a signatory to the agreement pursuant to which plaintiffs make their claim. Plaintiffs cite *In Re Plaza Mission Bottling Co.*, 14 BR 1428 (E.D.N.Y. 1981), which was not brought under § 301. However, the *Plaza* court found a bankrupt company to be a successor employer bound by a collective bargaining agree-

ment because representatives of the bankrupt had met with the union and formed an agreement to be bound by the bargaining agreement. No such separate agreement appears in the present case: Count II must be dismissed for failure to state a claim.

Counts III, IV and V

Counts III, IV and V make claims only against defendant Security Pacific and against the unknown and unidentified defendant John Doe lenders. The three counts allege violations of the Uniform Fraudulent Conveyance Act, §§ 4, 5 and 7, Wis. Stat. §§ 242.04, 242.05 and 242.07, respectively. Count III alleges that the defendant employers have made and will make conveyances and incur obligations with these defendants, without fair consideration, rendering the surviving entity insolvent within the meaning of Wis. Stat. § 242.04. Count IV alleges that the surviving entity will be so encumbered by pledges, liens and security interests to Security Pacific and the other defendant financial institutions that it will be severely and unreasonably undercapitalized within the meaning of Wis. Stat. § 242.05. Count V alleges that the defendant financial institutions have completed or will complete the conveyances and transfers attending the packaging division acquisition with actual intent to hinder, delay or defraud plaintiffs as creditors, in violation of Wis. Stat. § 242.07.

These three counts are virtually identical to counts in the state court action, and defendants contend that these claims are barred by *res judicata.* Plaintiffs state that their claims are not barred because the order of dismissal in the state action was entered only on behalf of defendants Continental and U.S. Can: Security Pacific was not a named defendant in the state court proceeding, was not served in that action, and did not appear as a defendant in state court. Further, plaintiffs argue, the state court dismissal was based on § 301 preemption which can not apply here because Security Pacific and the other lenders are not parties to a labor agreement falling within the scope of § 301.

Defendants contend the claims in counts 3–5 are barred by *res judicata* because they were dismissed by the state court. Strictly speaking, one action does not bar a second action absent an identity of parties or their privies and identity of causes of action in the two cases. *Leimert v. McCann,* 79 Wis. 2d 289, 294, 255 N.W. 2d 526 (1976). Because the defendant banks and lenders were not named parties in the first action, and the state judge "grant[ed] the motion of all named defendants who have joined the motion to dismiss," *Int'l. Ass'n. Machinists & Aerospace Workers v. United States Can Co.,* Record at 57 (Wis. Cir. Ct. July 24, 1987) (No. 87-CV-1349), identity of parties is lacking here. However, defendants evidently intend the term *res judicata* to incorporate "collateral estoppel," a not uncommon mistake. *See* Security Pacific's Reply Brief in Support of Motion to Dismiss at 3 n.2; *cf. Crowall v. Heritage Mutual Insurance Co.,* 118 Wis. 2d 120, 121–22, 346 N.W.2d 327 (Wis. App. 1983). In *Crowall,* the Wisconsin Court of Appeals held "that lack of mutuality of parties does not preclude the use of collateral estoppel when it is asserted defensively to prevent a party for [sic] relitigating an issue which has been conclusively resolved against the party in a prior case." *Id.* at 122.

As the state judge noted in considering counts 3–5 as made against the named defendants in the state action, "[t]he claim itself for which [Wisconsin Statutes chapter 242] gives a remedy is a claim entirely founded on a collective bargaining agreement. Plaintiffs in this lawsuit could not be creditors, but for the the [sic] underlying rights negotiated by the Union with the employers in the collective bargaining agreement." *Int'l. Ass'n Machinists & Aerospace Workers v. United States Can. Co.,* Record at 56 (Wis. Cir. Ct. July 24, 1987) (No. 87-CV-1349). The state judge's statement is clear, and this court is required to give the same authority to a judgment rendered by a Wisconsin court as would another Wisconsin court, under the full faith and credit implementing statute, 28 U.S.C. § 1738. *Luebke v. Marine National*

Bank of Neenah, 567 F.Supp. 1460 (E.D. Wis. 1983). That an appeal is pending in this matter does not diminish the judgment's conclusiveness. *Id.* at 1462. Collateral estoppel bars plaintiffs' claims set forth in counts 3-5 under the Uniform Fraudulent Transfer Act.

Plaintiffs argue that *res judicata,* and presumably collateral estoppel, can not apply because § 301 preemption will not apply to a cause of action against a non-party to the disputed labor agreement. That is, plaintiffs' brief suggests that since the state action's dismissal was based on § 301 preemption, the dismissal cannot have preclusive effect against the banks and lenders in this court. But in the circumstances presented here, *res judicata* (collateral estoppel) and preemption share a common foundation. A discussion of preemption as to these claims is useful, as it serves to affirm the true nature of plaintiffs' claims.

" '[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of agreement made between the parties in a labor contract,' the plaintiff's claim is preempted by § 301 of the Labor Management Relations Act." *Int'l. Brhd. Elec. Workers, AFL-CIO v. Hechler,* 107 S.Ct. at 2163. In Hechler, respondent was injured while working for Florida Power and Light Co. She sued her union in state court, alleging that " 'pursuant to contracts and agreements entered into by and between' the Union and Florida Power, and 'pursuant to the relationship by and between' the Union and respondent, the Union had a duty to ensure that respondent" was provided safety and not required to take undue risks. *Id.* at 2163-64. The Union removed the action to federal court, arguing that respondent's claim arose solely under federal law and was barred by the applicable statute of limitations. Respondent asserted that the basic nature of her action was a state common-law tort suit for the Union's negligence. *Id.*

The Supreme Court in *Hechler* noted: "Respondent's allegations of negligence assume significance if and only if the Union,

in fact, had assumed the duty of care that the complaint alleges the Union breached." *Id.* at 2168. The court did find provisions in the collective bargaining agreement and ancillary agreements between the Union and Florida Power upon which respondent could try to base an argument. "In order to determine the Union's tort liability, however, a court would have to ascertain, first, whether the collective bargaining agreement in fact placed an implied duty of care on the Union . . . and, second, the nature and scope of that duty." *Id.* at 2168. Therefore, the Court found that because any finding concerning tort liability would involve contract interpretation, "[t]he need for federal uniformity in the interpretation of contract terms . . . precluded [respondent] from evading the preemptive force of section 301 by casting her claim as a state-law tort action." *Id.* at 2168.

The *Hechler* Court did not consider the question of whether the Union had a duty of care arising "through independent state law responsibilities placed upon the Union simply by virtue of its relationship with its members, rather than as a result of the collective bargaining agreement." *Id.* at 2169-69 n.5. [sic] Plaintiffs in the case at hand characterize their claims in counts 3-5 as arising solely from state law. However, plaintiffs' basis for making a claim as creditors under the Uniform Fraudulent Conveyance Act (renamed the Uniform Fraudulent Transfer Act) is their status as employees protected by the IAM-Continental collective bargaining agreement. To establish whether plaintiffs can make out a claim under the Uniform Fraudulent Conveyance Act it would be necessary to interpret plaintiffs' rights under the collective bargaining agreement.

Realleging the same claims against other defendants once removed from the underlying collective bargaining agreement does not transform the true source or nature of the claim. Plaintiffs' claims under Wisconsin's Uniform Fraudulent Conveyance Act are effectively an effort to enforce the collective bargaining agreement through an action against the defendant lenders. In these

circumstances, applying Wis. Stat. §§ 242.04, 242.05 and 242.07 would require this court to interpret the collective bargaining agreement. As the Supreme Court has pointed out, a party cannot evade the preemptive force of § 301 by casting its claim as a state law action.

Counts VI and VII

In counts six and seven of the complaint plaintiffs allege that the defendants engaged in an unlawful conspiracy to transfer assets in violation of the Uniform Fraudulent Conveyance Act and to breach the collective bargaining agreement.

Defendant Continental and affiliated defendants argue that, because counts 6 and 7 are before this court solely on the basis of pendent jurisdiction, they must be dismissed since no federal claims remain before the court. Continental also contends that these claims are barred by *res judicata,* since they arise out of the same transaction as those counts raised in the previous court action. Defendants further argue that the conspiracy claims must be viewed as preempted. Alternatively, Continental asserts, federal labor law does not allow a civil action for conspiracy. For its part, Security Pacific simply states that it is not subject to claims made pursuant to § 301 in this matter.

Plaintiff argues that the conspiracy claims do not arise under state law, but under § 301 and the federal common law of labor relations. According to plaintiffs, these claims are consistent with the federal courts' obligation under § 301 "to create a body of federal law for the enforcement of collective bargaining agreements." *Int'l Bhd. of Elec. Workers v. Hechler,* 107 S.Ct. 2161, 2165 (1987).

Section 301 is not merely a jurisdictional statute. "[T]he substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor

laws." *Textile Workers v. Lincoln Mills,* 353 U.S. 444, 456 (1956). But as discussed above, a basic requirement under this federal common law is that plaintiffs seek remedies through the procedures outlined in their collective bargaining agreement before bringing action under § 301. *See, e.g., Republic Steel v. Maddox,* 379 U.S. at 652–53. Plaintiffs' conspiracy claims against Continental Can and affiliated defendants, therefore, must fail for reasons already discussed concerning counts one and two: plaintiffs have failed to satisfy the exhaustion requirement.

And plaintiffs themselves recognize that § 301 "can be invoked only against a party to the labor contract on which the action was founded," Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss at 9 (citations omitted), since § 301, by its express terms, provides a jurisdictional basis for contract actions between an employer and a labor organization. Under plaintiffs' federal common law theory, then, Security Pacific and other banks and lenders are not subject to the conspiracy claims.

No authority indicates that a common-law conspiracy claim exists under § 301, or that allegations of conspiracy alone give rise to a cause of action. *See, e.g., Abrams v. Carrier Corp.,* 434 F.2d 1234, 1253 (2d Cir. 1970), *cert. denied,* 401 U.S. 1009 (1971). This conclusion accords with the policy of enforcing collective bargaining agreements underlying § 301. The Supreme Court, in *Textile Mills,* "understood section 301 as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers v. Lueck,* 471 U.S. 202, 209 (1984). Allegations of conspiracy do not clearly focus on the contract dispute itself, as analysis under § 301 requires. Rather, plaintiffs' conspiracy allegations merely recharacterize plaintiffs' underlying contract claim. To the extent the conspiracy claim is grounded on breach of the collective bargaining agreement, the conclusion reached above as to counts one and two apply. To the extent it is grounded on the Uniform Fraudulent Transfer Act, the conclusions

reached regarding counts three, four and five apply. Preemption, collateral estoppel and failure to satisfy the procedural requirements for bringing a § 301 action preclude these claims in this court.

The conspiracy claims, as alleged in the complaint, might alternatively be construed as arising under state law. In that event, the last two counts would have to be dismissed because they are before the court on the basis of pendent jurisdiction and all federal claims have dropped out of the case. As the court of appeals for this circuit stated in *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 612 (7th Cir. 1986): "State law claims should not be retained for adjudication in federal court when the sole remaining basis for federal jurisdiction is the judge-made doctrine of pendent jurisdiction." *See also United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

Even if plaintiffs alleged diversity jurisdiction, Wisconsin's transactional approach to *res judicata* would apply to bar the conspiracy counts as state law claims against Continental and affiliated defendants. This approach defines a claim or cause of action as coterminous with the entire factual transaction out of which it arises. What constitutes the "transaction" is to be determined pragmatically, "giving weight to such considerations *as whether the facts are related in time, space, origin,* or motivation, whether they form a convenient trial unit, and whether this treatment as a unit conforms to the parties' expectations or business understanding or usage." *Landess v. Schmidt*, 115 Wis. 2d 186, 192, 340 N.W. 2d 213 (Wis. App. 1983) (quoting *Restatement (Second) of Judgments* § 24(2) (1982). Plaintiffs' conspiracy claims in this court are made against the same parties, based on the same events, as in the prior state court proceeding; the considerations listed above precisely identify the cases with each other; the transaction is the same. That plaintiffs might be prepared to present new evidence or theories not presented in the first action, or desire to seek new forms of relief, do [sic] not affect

this conclusion. *See DePratt v. West Bend Mutual Insurance Co.*, 113 Wis. 2d 306, 312, 334 N.W.2d 883 (1983) (citing *Restatement (Second) of Judgments* § 25 (1982). Further, the conspiracy itself cannot be construed as a separate transaction. Wisconsin law provides no civil action for conspiracy alone, but only for acts pursuant to a conspiracy. *Onderdonk v. Lamb,* 79 Wis.2d 241, 246, 255 N.W. 2d 507 (1977) (citation omitted). This latter rule bars state law conspiracy claims against not only the Continental defendants but also against the banks and other lenders, since the underlying claims are no longer present.

In sum, having fully considered the relevant law and all materials before the court, I conclude that this action should not have been filed. This decision renders moot defendants' motions for protective orders.

Sanctions

Both plaintiff and defendants request imposition of sanctions pursuant to Fed. R. Civ. P. 11, which provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith [sic] for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

In opposing defendants' application for sanctions, plaintiffs urge that their complaint is grounded in a good faith argument for extension of existing law. "Plaintiffs here are asking this Court

to flex its broad powers under Section 301 to create a remedy for employees whose employers undertake a business transaction that is a fraudulent conveyance under established state laws." Plaintiffs' Brief in Opposition to Defendants' Application for Sanctions and In Support of Plaintiffs' Cross-Motion for Sanctions, at 9. This contention is not evident anywhere except in response to defendants' argument for sanctions.

Federal courts are responsible for developing law in this area specifically because the subject matter of § 301 requires application of uniform federal laws to prevail over inconsistent local rules. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). Among the mechanisms used to achieve this consistency are the exhaustion requirement, obligating disputants to first seek recourse through the disputed contract's terms, and the preemption doctrine, precluding application of state rules purporting to define the meaning or scope of relevant contract terms. Plaintiffs' action in this court is an effort to evade fundamental rules governing § 301 actions.

Plaintiffs' contention that the state court judge invited them to bring their case to federal court does not justify this action. The state judge merely indicated that the state court was not a proper forum. Plaintiffs were responsible for making reasonable inquiry into the facts and law supporting their pleading. Fed. R. Civ. P. 11.

The source and nature of plaintiffs' various claims, as well as the intended application of particular claims to particular defendants, appeared to change when plaintiffs responded to defendants' motions for dismissal. Particular defendants understandably felt compelled to respond to allegations that plaintiff subsequently indicated did not apply to those defendants. Even plaintiffs' response did not adequately clarify their aim. This confusion attributable to plaintiffs is particularly unjustified in light of the fact that several counts in the complaint essentially mirror those in the state action.

Relying on *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000 (7th Cir. 1984), plaintiffs assert that subjective bad faith must be shown by a person against whom Rule 11 sanctions are considered. But "[t]he standard used is an objective 'one of reasonableness under the circumstances,' [Fed. R. Civ. P. 11 advisory committee note], rather than a subjective one. Consequently [plaintiffs'] reliance on *Suslick* . . . , decided under the old Rule 11 with its bad faith requirement, is misplaced." *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985). The Seventh Circuit gives Rule 11 strong emphasis:

> Rule 11 requires counsel to study the law before representing its content to a federal court. An empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating. Counsel who puts the burden of study and illumination on the defendants or the court must expect to pay attorneys fees under the Rule.
> *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986).

My analysis of this case and due regard for Rule 11 compel me to impose sanctions against plaintiffs. Actual costs as determined by the clerk of court pursuant to Local Rule 9 will be assessed against plaintiffs. Reasonable attorneys' fees, as set forth below, will be allowed to defendants Security Pacific Business Credit, Inc., Continental Can Company U.S.A., Inc., and United States Can Co. and its affiliates (CCC Series 2000, Inc., Inter-American Packaging, Inc., and G.P. Acquisition Company, Inc.). These fees are based on the complexity of the case, difficulty of issues, and relative burden borne by each of the defendants in defending this action. In addition, plaintiffs will be assessed $500.00 payable to the Clerk of Courts for the Eastern District of Wisconsin for application toward this district's *pro bono* fund.

Therefore,

IT IS ORDERED that defendants' motions to dismiss and for sanctions under Fed.R.Civ.P 11 be and the same are hereby GRANTED; and

IT IS FURTHER ORDERED that defendants' motions for a protective order be and the same are hereby DENIED as moot; and

IT IS FURTHER ORDERED that plaintiffs pay attorney's fees to the respective defendants in the following amounts:

$2,200.00 to defendant Continental Can Company U.S.A., Inc.;

$1,500.00 to defendant United States Can Co. and its affiliates (CCC Series 2000, Inc., Inter-American Packaging, Inc., and G.P. Acquisition Co., Inc.), collectively; and

$750.00 to defendant Security Pacific Business Credit, Inc.; and

IT IS FURTHER ORDERED that plaintiffs pay to the clerk of court $500.00 for deposit in the *pro bono* fund of the Eastern District of Wisconsin.

Dated at Milwaukee, Wisconsin this 12th day of April, 1989.

BY THE COURT:

/s/ J.P. STADTMUELLER

J.P. Stadtmueller
U.S. District Judge